

***United States Court of Appeals  
for the Second Circuit***



**REPLY BRIEF**





# 76-5007

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

76 - 5007

CAMELIA BUILDERS, INC., E.J. YELVERTON, JR.,  
FARNALE, INC., R.L. GOODALE AND JEFFREY H. HUBBARD,

Respondents-Appellants,

Versus

FIDELITY MORTGAGE INVESTORS, Debtor

Applicant-Appellee.

REPLY BRIEF OF APPELLANTS

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK  
HONORABLE RICHARD OWEN, JUDGE PRESIDING

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ATTORNEY FOR APPELLANTS.



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IN RESPONSE TO POINT I  
IN THE BRIEF OF FMI

At page 4 of its brief FMI asserts that the Bankruptcy Court entered an order on February 28, 1975 incorporating the provisions of Rule 11-44 with the result, apparently, that Respondents are adjudged guilty of violation of an order rather than a rule and consequently the efforts of Respondents to distinguish a rule from an order are not valid.

No evidence of an order of February 28, 1975 of the Bankruptcy Court has ever been offered in evidence by FMI herein. In fact, the only evidence of such an order is to be found as an exhibit to the offer of proof in connection with the conflict of interest and failure of FMI to provide lawful notice submitted by Respondents herein to the District Court; same having been submitted for the limited purpose of showing the date of the notice (August 8, 1975) as opposed to truth of the matter contained therein. At the time of hearing of the contempt before the Bankruptcy Court on April 10 and 11, 1975, FMI announced that the contempt motion was predicated upon a violation of Rule 11-44 as opposed to any order (page 3, transcript of proceedings before the Bankruptcy Court). Respondents deny knowledge of any order dated February 28, 1975 (page 72, 73, 94 and 115 Transcript of proceedings before the Bankruptcy Court).



Neither the Decision of the Bankruptcy Court, the Certificate of Facts showing Contempt, the Memorandum and Order of the District Court nor the Order under Bankruptcy Rule 920(a)(4) Adjudging Respondents Guilty of Civil Contempt makes any reference to an order of the Bankruptcy Court of February 28, 1975. In fact, all of the foregoing documents contain references only to Rule 11-44 of the Chapter XI Rules.

Arguing without conceding that the adjudication of contempt is based upon an order of the Bankruptcy Court dated February 28, 1975, as FMI notes in its brief at page 6, in order for there to be a finding of contempt it must be established that the alleged contemtor had knowledge of the order which he is said to have violated and as the record is void of any such order or of a finding that Respondents had knowledge of such an order, it follows that the decision of the District Court must be reversed.

The allegation by FMI at page 6 and 7 of its Brief to the effect that Respondent Hubbard understood Rule 11-44 is not supported by the evidence.



IN RESPONSE TO POINT III  
IN THE BRIEF OF FMI

At page 16 of its brief FMI argues the findings of the Bankruptcy Court to the effect that a Wall Street Journal article demonstrates that Respondents knew of the pending Chapter XI petition of FMI, and at page 17 of its brief then misquotes the said article. The correct newspaper article in its entirety is contained in the appendix filed herein and same contains no story at page 12. Respondents have no knowledge of how the newspaper article referenced in FMI's brief came to be in the record, but after having caused to be filed the record herein and at the time of filing Appellants' brief discovered that the correct newspaper article had been filed in the closed files of the Bankruptcy Court and the newspaper article referred to by FMI had, in some manner unknown to Respondents, come to find its way into the record of these proceedings.



IN RESPONSE TO POINT IV  
IN THE BRIEF OF FMI

Arguing without conceding that Respondents knew of the Chapter XI proceeding and that an error in judgment, if any there be, does not exonerate them (Freeman v. Ferguson, 292 S.W.2d 632 [Texas 1956]), it is to be recalled that at all times material hereto Respondents were logistically precluded from being able to effectively seek relief from the Bankruptcy Court which is a good excuse for failure to comply. Ex Parte Adair, 222 S.W.2d 324 (Tex. Civ. App. - Dallas 1949).



IN RESPONSE TO POINT V  
IN THE BRIEF OF FMI

The decisions in In Re: A. Roth Co., 125 F.2d 396 (7th Cir. 1942) and Town of Agawam v. Conners, 159 F.2d 360 (1st Cir. 1947) are not predicated upon an abuse of discretion by the Bankruptcy Court but rather upon a lack of jurisdiction of the Bankruptcy Court. The case of In Re: Stockman Dev. Co., 447 F.2d 387 (9th Cir. 1971) appears to stand only for the proposition that the debtor need not have property in its actual possession at the time of the filing of the Chapter XI proceeding in order for the Bankruptcy Court to have jurisdiction thereof but as the opinion notes the ruling is inapplicable to instances where an attempt is made to invoke the jurisdiction of the Bankruptcy Court to third party proceedings. In this connection, please note the Joint Venture was listed as a creditor of FMI in July of 1975.

Additionally, it does appear that In Re: Prudence-Bonds Corp., 77 F.2d 328 (2nd Cir. 1935) is inapplicable to the instant situation in that same involved a Chapter X proceeding and stands only for the proposition that the reorganization Court has jurisdiction to stay foreclosure by secured creditor which issue is not before this Court



and same is not in conflict with nor does it cite the case  
of Brunn v. Wichser, 75 F.2d 25 (3rd Cir. 1934).



IN RESPONSE TO POINT VI  
IN THE BRIEF OF FMI

At page 35 of its brief FMI's argument overlooks the allegations that FMI was in default in advancing the funds that are the basis of its claimed lien and was attempting to conduct its foreclosure at variance with State law as contained in paragraphs 10 and 18 of the Complaint filed in the Mississippi Action (Appendix 110, 111). In this connection, Judge Nixon in the Mississippi Action invited counsel to make a statement for the record to indicate the emergency of the matter before the Court and at such time as the Court had been advised of the allegation that FMI had not complied with the laws of the State of Mississippi in attempting to conduct its foreclosure the Court interrupted the statement of counsel finding that:

"Under the circumstances and due to the exigency of the situation, to deny the Plaintiff the right to proceed at this time would be denying him his day in Court to a moot question..." (Appendix 129)

The foregoing quote is further applicable in response to FMI's reliance upon Vass v. Conron Bros. Co., 59 F.2d 969 (2nd Cir. 1932). The Respondents had informed the Court in the Mississippi Action that they were mechanic's and materialmen's lien claimants and same was unquestionably a matter which the District Judge took into account in finding that the Joint Venture would be left with a moot question in the event a hearing were not conducted in connection with the



foreclosure. Respondents have cited to this Court in their brief the clear and unequivocal law of the State of Mississippi that demonstrates conclusively that the foreclosure proceeding adversely affected the mechanic's and materialmen's lien of the Joint Venture. In fact, the matter is so clear that FMI has not even attempted a response thereto in its brief.

Notwithstanding that the foreclosure proceeding by FMI clearly adversely affected the mechanic's and materialmen's lien rights of the Joint Venture, FMI still attempts to rely upon the Vass case as aforesaid, wholly overlooking its own quotation cited therein to the effect that:

"Merely to hold matters in status quo;  
to mark time as it were...such activities  
do not seem to us to be a continuance of  
the business." (59 F.2d at 971)

Clearly the Vass case holding is inapplicable to the present situation.

The holding of American Brakeshoe & Foundry Co. v. Interborough Rapid Transit Co., 10 F.Supp. 512 (S.D.N.Y. 1935) is similarly inapplicable in that same is based upon a determination that the property in issue in that case was in the custody of the Bankruptcy Court whereas in the instant case the property in issue was already in custody in the State Court action.



IN RESPONSE TO POINT VII  
IN THE BRIEF OF FMI

At page 48 of its brief, FMI misconstrues the import of the statements quoted therein. In the event this Court should find that the Joint Venture violated Rule 11-44 in instituting the Mississippi Action and that the remedy of civil contempt is available therefor to FMI and if the Joint Venture had been made a party hereto then Respondents do not question that the Joint Venture may be adjudged in contempt but as the Joint Venture is a separate and distinct entity under the laws of the State of Texas separate and apart from the Respondents and as the individual Respondents other than the corporate Respondents have no personal liability for acts of the Joint Venture under the laws of the State of Texas it does appear the Respondents cannot be adjudged guilty of contempt. Rule 17(b)(1) Federal Rules of Civil Procedure.

The issues before the Court are couched all the more in purely academic terms as the Court considers that subsequent to the events that are the basis of this proceeding FMI has instituted two lawsuits in Mississippi directly affecting the Joint Venture and Respondents herein; that all

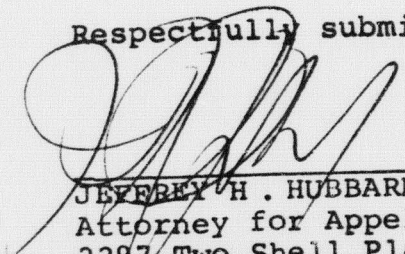


such matters have now been consolidated with the State Court Action and are set for trial therein in July of 1976 as demonstrated by true and correct copy of a portion of a motion filed by Respondents in the Court below which is attached hereto, marked Exhibit "A" and incorporated herein by reference for all purposes and the applicable portion of the response thereto filed by FMI which is attached hereto marked Exhibit "B" and incorporated herein by reference for all purposes.

CONCLUSION

Wherefore, Respondents respectfully pray that this Court reverse the order of the District Court adjudging Respondents guilty of civil contempt and render judgment for Respondents including all their costs and attorney's fees incurred herein and for such further relief as the Court may deem proper.

Respectfully submitted,



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Corporation but rather would and did pass from Mr. James Young, Trustee to the purchaser at said sale.

3.5 Surely it cannot reasonably be argued that every mechanic's and materialman's lien claimant has a duty to travel to New York to be relieved of a stay in the face of a foreclosure affecting the lien; otherwise, substantial numbers of persons may be required to expend more in legal and travel expenses than is the amount of their claim.

4.1 On or about December 22, 1975, FMI filed suit against the Travelers Indemnity Company in the United States District Court for the Southern District of Mississippi, Civil Action No. J75-363(C), a true and correct copy of which is attached as Exhibit "A" and incorporated herein for all purposes on the performance bond given by the Joint Venture as general contractor of the project in issue, FMI being a dual obligee thereof. (Unnecessary pages of exhibits omitted.)

4.2 On or about February 12, 1976, FMI filed an identical lawsuit against Travelers Indemnity Co. in the Circuit Court of the First Judicial District of Hinds County, Mississippi, Cause No. 23275, a true and correct copy of which is attached hereto, marked Exhibit "B" and incorporated herein by reference for all purposes.

4.3 Motions to Dismiss, true and correct copies of which are attached hereto and marked Exhibit "C" and Exhibit "D" respectively, and incorporated herein by reference for all purposes were filed in both of said lawsuits and in response thereto both of said lawsuits were transferred to Rankin County, Mississippi as demonstrated



by true and correct copies of the orders entered which are attached hereto, marked Exhibit "E" and Exhibit "F" respectively, and incorporated herein by reference for all purposes.

4.4 Subsequently, FMI filed a Motion to Consolidate a true and correct copy of which is attached hereto, marked Exhibit "G" and incorporated herein by reference for all purposes wherein it sought to consolidate one of its aforementioned lawsuits transferred to Rankin County, Mississippi with a lawsuit pending in said County by the Owner of the project against the Joint Venture and Travelers.

4.5 In response to the said Motion to Consolidate, the Circuit Court of Rankin County, Mississippi, by order dated April 6, 1976 a true and correct copy of which is attached hereto, marked Exhibit "H" and incorporated herein by reference for all purposes, consolidated into one cause of action all of the lawsuits then pending in said Court arising from the construction project including the prior action of the Joint Venture against FMI previously referred to by this Court as the State Court Action. Said lawsuit is now scheduled for trial in the July 1976 term.



2. Denies the averments set forth in Paragraphs 2, 2.1, 2.2, 2.3, and 2.4, and avers that Respondents have misinterpreted the law and the cases cited in said Paragraphs.

3. Denies the averments set forth in Paragraph 3.1 of the Motion except admits the accuracy of the quotes therein and avers that the Certificate of Facts dated July 29, 1975, at page 5, paragraph 3, stated and certified the following finding of fact:

3. Upon the filing of FMI of its Chapter XI petition, the automatic stay provision contained in Rule 11-44 of the Rules of Bankruptcy Procedure became applicable and stayed, inter alia, the commencement or the continuation of any court or other proceeding against the debtor. [Emphasis added.]

4. Denies the averments and legal conclusions set forth in Paragraphs 3.2 and 3.5 of the Motion. (There are no paragraphs 3.3 or 3.4 of the Motion.)

5. Admits the averments set forth in Paragraphs 4.1, 4.2, 4.3, 4.4 and 4.5 of the Motion.

6. Denies the averments and conclusions set forth in Paragraph 4.6 of the Motion and avers that the monies on deposit with the Clerk of the Court for the Southern District of Mississippi are the subject of a judgment of this court and pending appeal of said judgment are not available for the satisfaction of any action pending or to be commenced in any other court, said monies are the property of FMI and can be released only to FMI.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

7. All the issues and arguments set forth in the Motion have been heard by this court and decided in this court's decision dated December 16, 1975 and order dated January 15, 1976.

8. The issues and arguments set forth in the Motion